(3)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (CHHATISGARH)

W. P. No. 2287 of 2004

Petitioners : Sushil Kumar Agrawal
S/O Shri. K.L. Agrawal
Aged 38 Years
Railway Contractor
Tikarapara,
Bilaspur (Chhatisgarh)

Versus

Respondents :

1. Union of India
Through : Secretary
Indian Railways
New Delhi

2. General Manager
South East Central Railway
Bilaspur (Chhatisgarh).

3. Divisional Railway Manager
(Engineering)
South East Central Railway
Bilaspur

4. Senior Divisional Engineer
(Co-ord)
South East Central Railway
Bilaspur

5. M/s Singh Transporters
Railway and Government Contractor
78, Shanti Nagar
Ameri Road
Bilaspur – 495 001

P. R. No. 2287/04
Presented by Shri Sanjay Jadav
dated 26.7.04

Received Copy
Shri Yadav
26/7/04
Clerk to Shri
VINAY HARIT
Senior Central Government Standing Counsel
CHHATTISGARH HIGH COURT

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT/WRITS IN THE NATURE OF MANDAMUS, CERTIORARI ETC., DIRECTION/DIRECTIONS, ORDER/ORDERS AND SUCH OTHER APPROPRIATE WRIT

(297)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.2287 of 2004

Sushil Kumar Agrawal

- Versus -

Union of India and four others

POST FOR ORDER ON 29TH OCTOBER, 2004

Sd/-
L.C. Bhadoo
Judge

(298)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.2287 of 2004

Sushil Kumar Agrawal

- Versus -

Union of India and four others

Present: -

Smt. Shobha Menon, Senior Advocate with Miss Sharmila Singhai, Advocate: For the petitioner.

Shri Vinay Harit, Senior Central Government Standing Counsel: For respondents No.1 to 4.

Shri P. Diwakar, Advocate: For respondent No.5.

ORDER

(Passed on 29th October, 2004)

L.C. Bhadoo, J.

1. The petitioner, who was one of the tenderers, submitted his tender in response to the notice inviting tender No.W/A/T/42/2003-2004 dated 2.9.2003 issued by the respondent Railways, has questioned the legality and correctness of acceptance letter dated 8.6.2004 (Annexure P-13) issued by the Senior Divisional Engineer (respondent No.4) in favour of respondent No.5, whereby he has been allowed to supply, delivery and stacking of 1 lakh cubic meter machine crushed track ballast as per the Railway's specification from out side the Railway land at Nagar (N.G.E) & Surajpur (S.J.Q) Depots.

2. Brief facts leading to filing of this writ petition are that the respondent South East Central Railway {respondent No.3 - Divisional Railway Manager (Engineering)} issued a notice inviting tender (NIT) bearing No.W/A/T/ 42/2003-2004 for supply, delivery and stacking of 1 lakh cubic meter machine crushed track ballast as per the specification of Railways for supply of the same at Nagar & Surajpur Depots. The last date for submission of the tender documents was 30th October, 2003. Apart from the other tenderers the petitioner herein and respondent No.5 also submitted their tender documents within the stipulated time. On 30th October,

2003, as per the NIT, the tender documents were opened and after scrutiny of the same vide the impugned order (Annexure P-13), tender offer of respondent No.5 was accepted being the lowest price offered by him amongst all the tenderers. However, before acceptance of the said tender the petitioner herein made a representation (Annexure P-11) to respondent No.2 (General Manager) on 28.1.2004 pointing out that respondent No.5 has been invited for negotiation in spite of the fact that he did not submit the Ballast Test Report along with the tender form which is in sheer contravention of the tender system in to-to. In the tender form it was nowhere mentioned that mere submission of the money receipt will suffice to justify the quality of the ballast to be supplied. The tender documents were very specific regarding submission of the ballast test report of the quarries from where the ballast would be supplied and the test report must be of very recent date, but should not be older than six months from the date of submission of the tender documents. Aggrieved by the impugned decision, the petitioner herein has filed this writ petition, mainly on two grounds viz., that furnishing of the test report of impact value, abrasion value and water absorption value of the ballast to be supplied was mandatory as per the NIT and tender documents, whereas on the date of submission of the tender documents, respondent No.5 only submitted the receipt of deposit of ballast in the laboratory for testing; that does not meet the requirement. As per the tender documents, respondent No.5, in order to become eligible, ought to have submitted the test report itself. Therefore, the respondent Railway ought to have rejected the offer of respondent No.5 in spite of the fact that the offer of respondent No.5 was the lowest. The respondents were not entitled to relax the said condition and accept the test report, which was furnished by respondent No.5 on 11.11.2003 i.e. after the last date of submission of the tender documents. Therefore, the action of the respondents tantamounts to discriminatory, favouritism, oppose to the rule of law and constitutional values, prejudicial to the petitioner, violative of Article 14 of the Constitution of India and against the public interest. The second ground on which the petitioner has questioned the impugned order is that the respondents had not specified in the NIT, the ratio of quantity of supply at Nagar & Surajpur Depots.

Ultimately, the petitioner requested to quash the impugned acceptance order and direct the respondent Railway to issue fresh NIT in accordance with law.

3. In the return submitted by the Railways on behalf of respondents No.1 to 4, it has been mentioned that it is incorrect to say that the decision of respondents No.1 to 4 is arbitrary or smacks favouritism. The dispute relates to contract matter, which requires adducing of evidence, therefore, the writ petition is not maintainable. The petitioner ought to have approached the civil Court or the Central Vigilance Commission. The tender process was carried-on under the watchful eyes of a High Level Tender Committee comprising of three Senior Administrative Grade Officers of Railway Administration, who after examining all aspects of the matter, decided to accept the tender of respondent No.5, because the rate offered by him was competitive and the tender documents were found to be complete in all respects as per the rules and regulations. There being no illegality, arbitrariness, favouritism or unreasonableness, in the action of respondents No.1 to 4, the writ petition be dismissed. It has further been mentioned that the point raised by the petitioner that the ballast test report ought to have been filed along with the tender documents has no force in the light of the fact that testing of material in question is done by Geo Technical Engineering Laboratory of the answering respondents themselves, and also because of the fact that the testing process being lengthy requiring time of 20-30 days for preparing final test report, and further also because of the fact that test report in respect of a test carried-on more than six months prior to the date of submission of tender was not acceptable, the proof of the submission of sample of ballast proposed to be supplied by the tenderer to the Geo Technical Engineering Laboratory was considered sufficient. Accordingly, the test report submitted in due course of time after its having been received from the laboratory was taken into consideration before finalization of the contract. Copy of the Chief Track Engineer's letter dated 14.1.2002 to this effect is Annexure R-1. It has further been clarified that even though the tender conditions stipulated for submission of test report of ballast, but, as already submitted the proof of submission of ballast samples to the Railway's Geo Technical Laboratory was considered sufficient

compliance for consideration of the tender. The representations received by the Tender Committee were duly taken into consideration before their being rejected by the Tender Committee. Therefore, the contention of the petitioner has no force as the decision was taken in the public interest and in the interest of Railways as well as in accordance with the public policy.

4. Respondent No.5 in his return has submitted that the answering respondent has already started work on the land on which the lease has been granted by the Collector, Korea, after receiving the order dated 8.6.2004. In fact, huge quantity of crushed ballast is already ready for supply and as soon as the rain will permit, the same would be sent to the destination. All the machineries have been installed and are functioning on the spot for which the answering respondent has already invested a huge amount. Copy of relevant documents to this effect is Annexure R-5-1. The petitioner's notion is misconceived that the ballast test report was necessary at the time of submission of the tender documents. There was no mandatory condition that the said report is to be submitted along with the tender form. Document Annexure P-3 as filed by the petitioner is very clear to this effect. The answering respondent has filed a copy of the tender form showing various conditions of the tender and the said form is Annexure R-5-2. In the tender form itself eligibility criteria has been fixed and the answering respondent had fulfilled all those eligibility criteria, then only the work order has been issued and the work has been started by him. The last date for submission and opening of the tender was 30th October, 2003, meaning thereby that on the basis of the documents submitted by the parties, the tender was to be opened and then after verification of the documents, the work order was to be issued. As per the tender documents, 120 days time was allowed to the Department to scrutinize the tender and documents, and after verification of the documents, the work order was given. In fact, respondent No.5 had submitted application on 30.10.2003 for obtaining the test report, receipt of which was enclosed along with the tender documents, and ultimately on 11.11.2003 a report was issued by the laboratory of Railway confirming the fact that the samples submitted by the answering respondent was up to the mark. Copy of the report is Annexure R-5-3. The said receipt along

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with the tender form was submitted. It was not mandatory to submit the report along with the tender. Condition No.3.2 of the tender form further makes it clear that tenderer shall also furnish an undertaking as incorporated in the tender documents that the ballast supplied at all times will confirm to specifications for track, ballast as specified by Railway. Once the tender has been found to be correct, valid then the question of interference at the instance of the petitioner who was admittedly L-2 is not permissible under the law. So far as split of work, 80% in one depot and 20% in another depot, it does not affect the right of the petitioner at all. In the tender form itself, condition No.3 shall make it clear that the quantity shown in the attached schedule was guidance and only approximate, and the same was subject to variation according to the needs of the Railway. Respondent No.5 has already started executing the work, therefore, the writ petition is not maintainable. In the previous year also, same practice was prevailing which has been followed by the answering respondent for submitting the present tender. None of the tenders has ever been rejected by the Railway Department on the ground of non-submission of the test report at the time of submitting tender form. The Railway Department always accepts the receipt confirming the fact that the test report is being sought by the tenderer and whenever that report comes to the Railway Department after the opening of tender, such report is being considered by the Department and then only the work order is being issued. The intention of getting the test report is not to debar any person from participating in the tender or from awarding the work order but the intention is to ensure the quality of material which is to be supplied and keeping this object in mind, there are further clauses in the agreement. The offer of the answering respondent, being the lowest, has been rightly accepted. It has been requested that the petition be dismissed.

5. Rejoinder has been filed by the petitioner in which it has been denied that respondent No.5 has commenced the work and necessary documents in support of the reply have been furnished showing that so far work has not commenced.

6. I have heard learned counsel for the parties.

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7. Learned Senior Advocate for the petitioner primarily and mainly stressed upon the point that as per the terms and conditions of the tender it was necessary for every tenderer to submit the test report of the Railway Laboratory regarding the ballast which is to be supplied and the respondent Railway was not within the right to relax that condition as respondent No.5 on the date of opening the tender was not eligible since he submitted the test report only on 11.11.2003. Learned Senior Counsel while drawing the attention of the Court towards the previous NIT (Annexure P-3) issued by the Railways argued that wherever the respondent Railway had intention that submission of the test report along with the tender documents was not necessary, it indicated so in the NIT, and in the present case in the NIT (Annexure P-1) it was specifically mentioned that the test report of the ballast regarding the impact value, abrasion value and water absorption value was to be submitted along with the tender. She also drew the attention of the Court towards clause 3 of terms and conditions of the tender, which is under the heading "Conditions for Submission of Tender", sub-clause (3.1) envisages that each tenderer at the time of tendering shall submit the test report. She further argued while placing reliance on the document (Annexure R-1) dated 14.1.2002 submitted by the respondent Railways issued by the Chief Track Engineer, South Eastern Railway, that it was mandatory for tenderer to submit the test report along with the tender form, in which it has been mentioned that "as per latest specifications the submission of test report is mandatory and the tender should be rejected if the tenderer/ tenderers does/do not submit the same, however in case the delay is due to Railway Geo Lab. in submitting the Test Results, then a Certificate from Railway Authority has to be submitted along with Tender that he/they has/have already submitted the ballast sample for testing the same".

8. On the other hand, learned Standing Counsel for respondents No.1 to 4 argued that submission of the test report along with the tender documents was not mandatory and simple submission of receipt regarding submission of the sample for test was sufficient and it was the practice earlier also, because the Geo Technical Engineering Laboratory normally takes 20-30 days time for preparing the final

test report. Therefore it could have been submitted at the time of scrutiny of the tender documents.

9. Similar argument was advanced by learned counsel for respondent No.5 and he submitted that in the eligibility criteria in the tender document there was no such condition that the test report was to be submitted along with the tender documents. He also urged that various clauses of the tender document shows that even during the supply period, regular inspection is to be conducted by the Railway authorities, therefore, there is no chance of supplying sub-standard ballast. In the circumstances, the submission of the test report even after the last date of submission of the tender documents was sufficient compliance and this has been the practice of the respondents; following the same practice respondent No.5 being the lowest tenderer they rightly accepted his tender. He placed reliance on the decision of the Hon'ble Apex Court in the matter of **Directorate of Education and others v. Educomp Datamatics Ltd. and others** reported in **2004 AIR SCW 1505**.

10. Before adverting to the arguments advanced by the respective counsel, it is necessary to look into relevant law on the point as has been laid down by the Hon'ble Apex Court about the powers of High Court for exercising judicial review under Article 226 of the Constitution of India in the matter of award of contracts.

11. The Hon'ble Apex Court after reviewing all case law on the point as to the extent to judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in detail in the matter of **Tata Cellular v. Union of India** reported in **1994 (6) SCC 651** and held that

> "94. The principles deducible from the above are:
> (1) The modern trend points to judicial restraint in administrative action.
> (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
> (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the*

decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) *The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

(Emphasis supplied)

12. In another decision in the matter of **Air India Limited v. Cochin International Airport Limited** reported in **(2000) 2 SCC 617**, the Hon'ble Apex Court observed that

> "The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. *The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.* It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interfere if it is bound vitiated by mala fides, unreasonableness and arbitrariness."
>
> (Emphasis supplied)

13. The law laid down by the Hon'ble Apex Court in the above decisions is that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. The State and its instrumentalities must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere.

The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments, which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

14. In the matter of **Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others** reported in **(2000) 5 SCC 287**, it was held by the Hon'ble Apex Court that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the Courts to say whether the conditions prescribed in the tender under considerations were better than the one prescribed in the earlier tender invitations. But, in case of the deletion of eligibility condition after expiry of the time-limit for submission of tenders, but before opening the tender, the Court held that award of contract to a tenderer who at the time of submission of tender did not satisfy the said condition rightly set aside by High Court as arbitrary. The Apex Court further held that the Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate. The Government can reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons as fairness and equal treatment should be given to all the tenderers and all participants in the tender process should be treated alike.

15. In the matter of **Ramana Dayaram Shetty v. International Airport Authority of India and others** reported in **(1979) 3 SCC 489**, the Apex Court held that

> "Administrative authority is equally bound by the norms, standards and procedures laid down by it for others – Disregard of the norm or standard would invalidate its action unless based on some valid principle which is neither irrational or unreasonable

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nor discriminatory – Rule against such arbitrary action applies independently of Article 14."

"Standard of eligibility laid down in the notice for tenders, held, cannot be departed from arbitrarily – Such departure from the standard, held, will amount to denial of equality of opportunity to those who felt bound by the standard of eligibility and therefore did not submit their tenders."

"Relaxation of the standard of eligibility at the time of considering the tenders or applications, held, will amount to a denial of opportunity to those who considering themselves ineligible did not apply."

In the matter of **Ramana (supra)**, tenders were invited by the International Airport Authority from "Registered IInd class hoteliers having at least 5 years' experience for putting up and running a IInd class Restaurant and two Snack Bars at the Airport for a period of 3 years". The tender of respondent No.4 being highest was accepted, but respondent No.4 pointed out themselves that their experience relating to catering was for ten years in running canteens for well-known organizations. Therefore, respondent No.4 was found lacking in eligibility criteria, as he was not having "Registered IInd class hotelier having at least 5 years' experience", but was having experience of catering in canteens. The Court held that accepting the tender of respondent No.4 was contrary to the condition of eligibility and was not flexible. There was thus, denial of equal opportunity offending Article 14 of the Constitution of India.

16. In the matter of **W.B. State Electricity Board v. Patel Engineering Co. Ltd. and others** reported in **(2001) 2 SCC 451**, the Apex Court held that

"Distribution of State largesse – Government Contracts – Tenders – Rule of law and constitutional values, must be adhered to when awarding contract – Rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism, which are contrary to rule of law and constitutional values – Relaxation by State or its agencies of a rule or condition in favour of a particular bidder, held, not permissible unless expressly provided for in the rules."

"Protection of public interest – Adherence to the rules, held, is the best principle to be followed in the public interest."

"Principle of awarding contract to lowest tenderer, held applies when all things are equal."

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It was further held that

> "where bidders who fulfill pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. Such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. Therefore adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest."

17. Now, in the light of the above law laid down by the Apex Court in the above judgments, if we look into the facts of the present case, the NIT (Annexure P-1) was issued by respondent No.4 in which it was specifically mentioned that the test report from the Geo Technical Engineering Laboratory issued by Bilaspur/Kolkata/ Alipur, regarding impact value, abrasion value, water absorption value was to be submitted and that should not be older than six months from the date of opening of the tender documents. Similarly, in sub-clause (3.1) of the terms and conditions at page 45 under the heading "Conditions for Submission of Tender", it was mentioned that "each tenderer at the time of tendering shall submit the test reports of impact value, abrasion value and water absorption value from Material Testing Laboratory of IIT/Kharagpur or Regional Engineering College/Rourkela or VRCE/Nagpur or Geo Technical Laboratory of Construction Organization, S.E.C. Railway/ BSP or Jadavpur University, Kolkata or National Test House, Alipur, Kolkata. The test report should not be older than 6 calendar months excluding the month in which the tender is opened". Sub-clause (3.2) further lays down that "the tenderers shall also furnish an undertaking as incorporated in the tender documents that the ballast supply at all times will conform to specifications for track

ballast as specified by Railway". Therefore, in view of the above, in the NIT itself and the terms & conditions of the tender, it was specifically prescribed that the test report of the ballast was to be submitted along with the tender documents.

18. It is true that from perusal of Annexure P-3 it appears that prior to this Railway used to accept the receipt regarding deposit of the ballast for testing, but the Railway authorities in its wisdom based on the past experience and looking to the quantum of the ballast to be supplied thought it proper to have the ballast reports in advance at the time of submission of the tender documents. Had it not the intention of the respondent Railway authorities, then they ought to have, as per the past practice, mentioned in the NIT that deposit of the receipt regarding deposit of the ballast for the test will be sufficient compliance. Therefore, I do not find any substance in the argument of the learned counsel for the respondents that even if the ballast test report was not submitted at the time of submission of the tender documents, even then respondent No.5 was eligible for the contract. As has been held by the Apex Court in the case of **W.B. State (supra)** when the tender document lays down and prescribes the rules and instructions that should be complied scrupulously in order to avoid discrimination, and the terms and conditions cannot be given go-by as the same encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values as also public policy. Adherence to the rules and instructions is the best policy and relaxation or waiver of a rule or condition, cannot be permitted.

19. In the present case, in the terms and conditions of the tender and the NIT, no such power regarding relaxation or waiver has been given to the Railway authorities. The State and its instrumentalities are bound to take decision in transparency and are required to follow the instructions, terms and conditions of the tender documents mentioned in the NIT as per law laid down in Ramana Dayaram Shetty's case and also in W.B. State Electricity Board's case.

20. Now, coming to the argument of learned counsel for respondent No.5 that in terms and conditions at page 33 under the heading

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"Eligibility Criteria" no such condition was imposed, therefore, it cannot be held that it was mandatory for respondent No.5 to submit the ballast test report at the time of submission of the tender. But, I do not find any substance in this argument for the reason that it is true in the eligibility criteria this condition has not been mentioned, but in the same document of terms and conditions as has been mentioned above at page 45 under the heading "Conditions for Submission of Tender", sub-clause (3.1) has been incorporated and as per that clause each and every tenderer was required to submit the test report at the time of submission of tender.

21. Similarly, I do not find any force in the argument of learned counsel for respondent No.5 that even during the supply period as per the terms and conditions of the tender, the Railway authorities are required and entitled to inspect every lot of ballast supplied by the tenderer and if the same is found of inferior quality then they are entitled to reject the same. But this condition has been imposed in order to ensure the supply of standard ballast, and the same cannot absolve respondent No.5 to meet with the requirement of clause 3.1 of the tender document mentioned above. If it was so, then where was the necessity to ask for submission of the test report along with the tender documents? The first requirement was that the test report should be submitted along with the tender documents in order to ascertain the capacity and capability of the tenderer to supply the ballast of required quality, and further condition was imposed to ensure that contractor should supply the ballast of standard quality and he must know that the ballast supplied by him shall be subjected to inspection, therefore, he cannot be exempted or the condition cannot be relaxed for filing the test report at the time of submission of the tender documents, because that is the first condition to become eligible to compete in the contract. In this regard, clause 3.2 has been incorporated that for future supply of the ballast of required quality and standard the tenderer was required to give an undertaking that he shall supply the ballast of the standard and quality as per norms and specifications fixed by the Railway. The argument of learned counsel for the respondents that in past also such relaxation was being given is also of no help to the respondents. In the first instance, respondents No.1 to 4 i.e. the Railway authorities have not mentioned in their return that

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such relaxation was being granted in spite of the fact that such terms and conditions which have been laid down in the present NIT and tender documents were there.

22. Document Annexure R-1 submitted by respondents No.1 to 4 further strengthens the fact that filing of the test report was mandatory because, this NIT was issued on 2.9.2003, whereas as back as on 14th January, 2002, the Chief Track Engineer, South Eastern Railway issued instructions on enquiry regarding tender policy that **"as per the latest specifications the submission of test report is mandatory and the tender should be rejected if the tenderer/tenderers does/do not submit the same, however in case the delay is due to Railway Geo Lab. in submitting the test results, then a certificate from Railway authority has to be submitted along with Tender"**. In this case, no such defence has been taken by the respondents that the ballast was submitted by respondent No.5 in time for testing the same in the Geo Laboratory, but test report could be issued on account of delay in Geo Lab. and no such certificate has been submitted by respondent No.5, because the ballast was submitted by respondent No.5 on the last date of submission of the tender i.e. 30th October, 2003. Had the ballast deposited 20-30 days prior to 30th October, 2003, then and then only respondent No.5 could have obtained a certificate to the effect that on account of delay in Geo Lab. the test report could not be submitted. Therefore, in presence of Annexure R-1 submitted by respondents No.1 to 4, it is more clear that the condition regarding submission of the test report regarding quality of the ballast was mandatory.

23. It is not out of place to mention here that the quality of ballast is ensured in order to maintain the tracks of Railway in perfect order for smooth and safe running of the trains on tracks, for the safety of passengers and goods is involved in the matter. It seems that keeping this fact in mind, the Railway authorities thought it proper to have the ballast report at the time of submission of the tender documents.

24. Therefore, in view of the above discussion, I am of the considered opinion that the decision taken by the Railway authorities was in contravention of the terms and conditions of the tender document

and NIT, and arbitrary and unreasonable as the same has not been able to stood up to the test laid down by the Hon'ble Apex Court in the afore mentioned decisions, and the same being contrary to the settled principles of law and public policy, it deserves to be quashed.

25. Now, coming to the question of delay and lapse in the matter of filing of this writ petition, I do not find any substance in this point for the reason that in the first instance, after opening the tender and before acceptance of the tender i.e. on 8.6.2004 at least 5 ½ months' in advance the petitioner herein made a representation dated 28.1.2004 (Annexure P-11). Apart from that the tender of respondent No.5 was accepted on 8.6.2004 and as soon as the petitioner came to know, he filed this writ petition on 26.7.2004. As far as the point raised by respondent No.5 that he has already started work and huge investment has been incurred by him, this contention of respondent No.5 is without any basis and the same has been raised in an exaggerated manner which has been belied by the documents filed by the petitioner herein. In the rejoinder dated 10.9.2004 in specific terms, the petitioner again in paras 1, 2 & 3 by filing the documents, has demonstrated that so far, no work has been undertaken by respondent No.5. This writ petition was filed on 26.7.2004, whereas, it is evident from the letter dated 23.7.2004 that the Assistant Mining Engineer vide his order dated 23.7.2004 allotted the land for excavation of stone and even thereafter, before commencement of stone crushing, respondent No.5 was required to undertake other steps also i.e. taking electric connection, no objection from the Environment Department and permission to work from the Collector under Section 247 (7) of the M.P. Land Revenue Code. The document filed by the petitioner herein Annexure RJ-1 dated 28.8.2004 shows that respondents' stone crusher and transportation was registered in the District Industries Department on 24.8.2004, whereas the stay was already granted by this Court on 20th August, 2004. The letter issued by the Environment Office on 31.8.2004 (Annexure RJ-2) shows that so far no objection has not been taken by respondent No.5 from the Environment Department. Even the Up-Sarpanch of Gram Panchayat: Ujiarpur has given a certificate on 28.8.2004 (Annexure RJ-3) that so far no crusher stone machine has been set up by the respondent. Similar certificate has been given by other persons of the village.

Respondent No.5 has not filed any counter reply to this fact that the work has already been commenced. The above rejoinder of the petitioner and the documents furnished by him belies the stand of respondent No.5 that he has already commenced the work.

26. However, I do not find any substance in the ground raised by the petitioner that the NIT does not reflect the ratio of quantity of supply at Nagar and Surajpur Depots for the reason that in Note No.1 of Schedule of Annexure P-10 it has been mentioned that the tenderers are required to quote single rate for entire quantity and both depots. Therefore, in view of this note, I do not find any justifiable ground questioning the impugned acceptance of the tender.

27. As far as the question raised by respondents No.1 to 4 about the maintainability of this writ petition that the petitioner had ought to have approached the civil Court is concerned, I do not find any substance in this point as this writ petition has been filed by the petitioner challenging the decision of respondent No.4 in awarding the contract to respondent No.5 in violation of the terms and conditions of the NIT. Therefore, primarily in this petition no disputed facts are involved; only the Court is required to interpret the terms and conditions and to see whether the decision of respondent No.4 is in consonance with the terms and conditions of the NIT. In the matter of **ABL International Ltd. and other vs. Export Credit Guarantee Corporation of India Ltd. and others** reported in **(2004) 3 SCC 553**, the Hon'ble Apex Court held that

> "In an appropriate case, the writ court has jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar in regard thereto. A writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record will not normally be entertained under Article 226. However, if the facts require, oral evidence can be taken. So where disputed questions of fact pertaining to the interpretation/meaning of documents or part(s) thereof are involved the courts can very well go into the same and decide the objections if facts permit. Moreover, merely because one of the parties wants to dispute the meaning of a document or part thereof would not make it a disputed fact."

As in this writ petition, terms and conditions of the NIT and tender documents are to be interpreted and no disputed facts are

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involved, therefore, I am of the opinion that the objection raised by respondents No. 1 to 4 is not maintainable.

28. In the result, the petition is allowed and the impugned order Annexure P-13 accepting the offer of respondent No.5 by respondent No.4 is quashed. However, the respondents will be at liberty to take further steps in accordance with law. There will be no order as to costs.

Sd/-
L.C. Bhadoo
Judge
29.10.2004

Soma